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# What Happens in London, Stays in London: The Long and “Strong” Arms of Dodd-Frank’s Extraterritorial Provisions

## I. INTRODUCTION

During Frederick Goodwin’s<sup>1</sup> seven-year stint as CEO of the Royal Bank of Scotland (RBS), RBS rapidly expanded its assets by over \$3.8 trillion.<sup>2</sup> In 2007, RBS purchased a third of ABN AMRO Group, a Dutch banking corporation, for approximately \$38 billion as part of this growth.<sup>3</sup> At the end of 2008, however, the bloom was officially off the rose and RBS reluctantly reported losses in excess of \$47 billion,<sup>4</sup> with significant losses stemming from its newly acquired company.<sup>5</sup> Eventually RBS, like other financial institutions around the world who had to be rescued by their respective governments,<sup>6</sup> found itself in such a precarious financial position that it had to be rescued by a partial U.K. government takeover.<sup>7</sup> Several purchasers of RBS securities alleged deceptive trade practices (including inflated stock prices, inaccurate accounting of “goodwill,” and inaccurate reporting of losses due to high exposure to the subprime mortgage market) that prompted them to

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1. The beleaguered former leader of RBS was recently stripped of his knighthood by Queen Elizabeth due to his part in the 2008 financial crash. Jill Lawless, *Ex-RBS CEO Fred Goodwin Stripped of Knighthood*, ASSOCIATED PRESS (Jan. 31, 2012), <http://www.npr.org/templates/story/story.php?storyId=146118199>; see also Sarah Arnott, *The Rise and Fall of ‘Fred the Shred’*, BUS. WK. (Oct. 14, 2008), [http://www.businessweek.com/globalbiz/content/oct2008/gb20081014\\_007788.htm](http://www.businessweek.com/globalbiz/content/oct2008/gb20081014_007788.htm) (discussing the problems that Fred Goodwin had during his tenure at RBS).

2. See *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327, 331 (S.D.N.Y. 2011).

3. *Id.* at 332.

4. *Id.* at 331.

5. *Id.* at 332-33.

6. See, e.g., Matthew Karnitschnig et al., *U.S. to Take Over AIG in \$85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, WALL ST. J., Sept. 16, 2008, at A1.

7. See *In re Royal Bank of Scot. Grp.*, 765 F. Supp. 2d at 331 n.4 (“As of approximately July 2009, the U.K. government had acquired a 70% ownership stake in RBS to prevent its total collapse as RBS lost £47 billion (\$87 billion) of market value from its peak in December 2007.” (quoting Consolidated Amended Complaint ¶ 4)).

purchase the soon-to-be deeply devalued securities.<sup>8</sup> In the wake of the domestic and global financial meltdown - with financial houses of cards crashing all around - the Treasury Department argued in a June 2009 white paper that one of the underlying purposes of sweeping financial reform was to increase the transfer of data between regulatory bodies in the hopes of identifying and lessening the damage caused by fiscally unstable international financial institutions.<sup>9</sup> A key area of concern was increasing international cooperation and regulatory standards in light of the knowledge that “financial stress can spread easily and quickly across national boundaries.”<sup>10</sup> Despite these concerns, in June 2010, the Supreme Court dealt a huge blow to the ability of private investors to bring international claims under U.S. securities laws, in *Morrison v. National Australia Bank Ltd. (Morrison)*.<sup>11</sup> Subsequently, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),<sup>12</sup> containing extraterritorial provisions, 929P<sup>13</sup> and 929Y,<sup>14</sup> that became effective on July 21, 2011.<sup>15</sup>

This Note will examine the effects of the new provisions of Dodd-Frank on the Securities and Exchange Commission’s (SEC) and Department of Justice’s (DOJ) ability to exert extraterritorial jurisdiction over foreign issuers, and whether there is any recourse for private investors to bring enforcement actions in light of the Supreme Court’s decision in *Morrison*. Part II of this Note will provide an overview of the case law regarding extraterritorial application of U.S. securities laws prior to the *Morrison* decision, which utilized the “conduct and effects tests”<sup>16</sup> to determine if a U.S. court could exert

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8. *Id.* at 330-33. RBS securities are listed on the London Stock Exchange and other exchanges outside of the United States. *Id.* at 329.

9. U.S. DEP’T OF THE TREASURY, FINANCIAL REGULATORY REFORM – A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 3-4, 16-17, 80-81 (2009), available at [http://www.treasury.gov/initiatives/Documents/FinalReport\\_web.pdf](http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf).

10. *Id.* at 8, 80-81.

11. See generally *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010) (rejecting decades of lower court jurisprudence that embraced the conduct and effects tests in determining the extraterritorial reach of the Securities and Exchange Acts of 1933 and 1934).

12. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S. Code).

13. 15 U.S.C. § 77v(c) (Supp. IV 2010) (amending 15 U.S.C. § 77v (2006)).

14. Dodd-Frank Wall Street Reform and Consumer Protection Act, § 929Y, Pub. L. No. 111-203, 124 Stat. 1376, 1871 (2010).

15. Pub. L. No. 111-203, 124 Stat. 1376.

16. See Client Alert, Chadbourne & Park LLP, Supreme Court Limits Federal

extraterritorial jurisdiction over a securities fraud case.<sup>17</sup> Part III will discuss the new “transactional test”<sup>18</sup> developed by the *Morrison* Court.<sup>19</sup> The *Morrison* decision barred individual “F-cubed” plaintiffs, foreign plaintiffs who purchased the traded foreign securities abroad on a non-domestic exchange,<sup>20</sup> from bringing enforcement actions in the United States under the Exchange Act of 1934.<sup>21</sup> It can be argued that the *Morrison* decision erroneously eliminated the conduct and effects tests after decades of lower court jurisprudence.<sup>22</sup> Part IV will discuss the application of the *Morrison* decision to *In re Vivendi Universal, S.A. Securities Litigation (In re Vivendi)*.<sup>23</sup> Part V will examine the *In re*

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Securities Fraud Claims to Securities Traded, Purchased or Sold Domestically (July 8, 2010), <http://www.chadbourne.com/publications/> (follow “Publications” hyperlink; then search “Client Alerts” hyperlink) (describing the conducts and effects tests as tests which allowed extraterritorial application of U.S. securities laws if the conduct happened within the U.S. border or when there were significant effects upon the U.S. securities market or citizens); Client Newsflash, Davis Polk & Wardwell LLP, *Update: U.S. Supreme Court Limits Extraterritorial Application of U.S. Securities Laws—Morrison v. National Australia Bank* (June 28, 2010), [http://www.davispolk.com/files/Publication/b8410ed8-13e1-40b0-8f12-033b6ea69c83/Presentation/PublicationAttachment/450c2bc3-1d4e-4440-9cd5-a3eff5e1dd2e/062510\\_morrison\\_v\\_nab.html](http://www.davispolk.com/files/Publication/b8410ed8-13e1-40b0-8f12-033b6ea69c83/Presentation/PublicationAttachment/450c2bc3-1d4e-4440-9cd5-a3eff5e1dd2e/062510_morrison_v_nab.html) [hereinafter Client Newsflash] (discussing the background facts and judicial opinion in *Morrison* and Dodd-Frank as a potential regulatory response).

17. See *infra* Part II.

18. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2886 (2010) (limiting the extraterritorial application of the Exchange Act to purchases or sales that take place in the United States or securities listed on a U.S. exchange); Memorandum for Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates, U.S. Supreme Court Greatly Restricts Extraterritorial Application of Civil Securities Fraud Actions (July 19, 2010), available at <http://www.skadden.com/Index.cfm?contentID=51&itemID=2112> (characterizing the transactional test as a clear rule based on whether the traded security was listed on a U.S. stock exchange or if the purchase or sale of the security occurred within the United States); *infra* Part III.

19. See *infra* Part III.

20. William C. Fredericks, “Foreign-Cubed” and “Foreign-Squared” Securities Litigation in the Wake of *Morrison v. National Australia Bank*, in “BET THE COMPANY” LITIGATION: 2010, at 88 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. H-840, 2010) (discussing the lower courts’ previous analysis of extraterritorial securities claims and the impact of the *Morrison* decision on F-cubed and F-squared plaintiffs).

21. Client Memorandum, Cravath, Swaine, & Moore LLP, *Morrison v. National Australia Bank Ltd. –The U.S. Supreme Court Confirms that Section 10(b) of the Securities Exchange Act Does Not Apply Extraterritorially & Dismisses the Claims of “F-Cubed” Plaintiffs*, 2 (July 6, 2010), available at [http://www.cravath.com/files/Uploads/Documents/Publications/3225362\\_1.pdf](http://www.cravath.com/files/Uploads/Documents/Publications/3225362_1.pdf) [hereinafter Client Memorandum] (discussing the court’s holding in *Morrison* and explaining that one of the implications of the decision is that “F-cubed” lawsuits are prohibited).

22. See *Morrison*, 130 S. Ct. at 2888-92 (Stevens, J., concurring) (arguing that the majority’s elimination of the conduct and effects test was ill-conceived).

23. *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158 (S.D.N.Y. 2003), 242 F.R.D. 76 (S.D.N.Y. 2007), *rev’d*, 765 F. Supp. 2d 512 (S.D.N.Y. 2011); see also *infra*

*Royal Bank of Scotland PLC Securities Litigation (RBS PLC)*<sup>24</sup> decision as a case study, arguing that the court applied the *Morrison* transactional test too broadly to the case.<sup>25</sup>

The Southern District of New York has interpreted the *Morrison* holding broadly.<sup>26</sup> As a result, the court precluded recovery for “F-squared” claimants - generally U.S. plaintiffs who purchase foreign securities on a foreign exchange - seeking remedy in a U.S. court<sup>27</sup> and extended the holding to the Securities Act of 1933.<sup>28</sup> It can be argued that this application of *Morrison* by the Southern District of New York has improperly exceeded the bounds of the Supreme Court’s core holding and that there should be a different interpretation.<sup>29</sup> Part VI of this Note will outline the pertinent Dodd-Frank extraterritorial provisions, sections 929P and 929Y, and argue that these new provisions would not have altered the Southern District of New York’s ruling in *RBS* and that the extraterritorial provisions of Dodd-Frank may have less reach than Congress intended.<sup>30</sup>

## II. “CONDUCT AND EFFECTS”: EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAWS PRE-*MORRISON*

The main objective of section 10(b) of the Exchange Act of 1934, along with SEC Rule 10b-5 promulgated under the authority of the Exchange Act,<sup>31</sup> is to protect U.S. citizens from fraud in the

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### Part IV.

24. *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327 (S.D.N.Y. 2011).

25. *See infra* Part V.

26. *See, e.g.*, Brian J. Bartow, Comment, Study on Extraterritorial Private Rights of Action, Dodd-Frank Act Release No. 34-63174 (Nov. 10, 2011), <http://www.sec.gov/comments/4-617/4-617.shtml> (discussing recent lower court decisions following *Morrison*, including *In re Royal Bank of Scotland*, and noting that the *Morrison* decision has been applied broadly to preclude private investors from bringing suit).

27. *See* Fredericks, *supra* note 20, at 87.

28. *See In re Royal Bank of Scot. Grp.*, 765 F. Supp. 2d at 338 n.11.

29. *See generally* Marco Ventrone, *Like Moths To A Flame? International Securities Litigation After Morrison: Correcting The Supreme Court’s “Transactional Test”*, 52 VA. J. INT’L L. 405 (2012) (advocating for a new “effects” test and arguing that as it stands, the *Morrison* holding can be interpreted too broadly to extend to transactions that should not be covered by U.S. securities laws or too narrowly, which would wrongly preclude protection for U.S. investors).

30. *See infra* Part VI.

31. *See* Securities Exchange Act of 1934 §10, 15 U.S.C. §78j(b) (2006); Employment of Manipulative and Deceptive Devices Rule, 17 C.F.R. § 240.10b-5 (2011).

purchase and sale of securities.<sup>32</sup> The Securities Act of 1933 prohibits fraud in the issuance of securities,<sup>33</sup> while the Exchange Act of 1934 prohibits fraud in association with the purchase and sale of securities on an exchange.<sup>34</sup> Section 10(b) of the 1934 Act provides, in relevant part, that:

It shall be unlawful for any person, directly or indirectly . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations . . . .<sup>35</sup>

Before *Morrison*, the lower courts' interpretation of whether the antifraud provisions of the Exchange Act of 1934 applied extraterritorially varied, but did not wholly preclude recourse.<sup>36</sup> Even though both the Securities Act of 1933 and section 10(b) of the Exchange Act of 1934<sup>37</sup> are silent with respect to whether they apply extraterritorially,<sup>38</sup> federal courts construed them to cover fraudulent

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32. See 15 U.S.C. §78j(b); S. Rep. No. 792, 73d Cong., 2d Sess., at 1-5 (1934), reprinted in 5 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 SECURITIES EXCHANGE ACT OF 1934, Item 17, at 1-5 (J.S. Ellenberger & Ellen P. Mahar eds., 2001) (describing the manipulation of the stock market, inadequacy of self-regulation on the stock exchanges, and the need to protect investors against manipulation of stock prices); *The Laws That Govern the Securities Industry, Securities Exchange Act of 1934*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/about/laws.shtml> (last updated Jan. 4, 2012) [hereinafter *The Laws That Govern*] (stating that the objectives of the Securities Act are to ensure that purchasers of securities obtain adequate information regarding the securities being sold and prohibiting fraudulent misrepresentation and noting that a goal of the Exchange Act is to bar specific types of activities).

33. See Securities Act of 1933 § 1, 15 U.S.C. §§ 77a-77mm (2006); *The Laws That Govern*, *supra* note 32.

34. See 15 U.S.C. §78j (2006); *The Laws That Govern*, *supra* note 32.

35. 15 U.S.C. § 78j (2006).

36. See Ventoruzzo, *supra* note 29, at 406-08 (discussing the complexity of the conduct and effects test that delivered varied results but were disposed of by *Morrison*).

37. Section 30(b) of the Exchange Act does provide a general extraterritorial provision that makes the 1934 Act applicable to persons who transact business on foreign exchanges in violation of SEC rules. 15 U.S.C. § 78dd(b) (2006); see also Louis Loss, *Extraterritoriality in the Federal Securities Code*, 20 HARV. INT'L. L. J. 305, 305 (1979).

38. See, e.g., *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31-32 (D.C. Cir. 1987), *abrogated by Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010) (noting that there is a presumption against extraterritorial effect for laws passed by Congress, unless Congress' intent is otherwise, but recognizing that the goals of the Securities and Exchange

acts initiated within the United States but consummated abroad.<sup>39</sup> Prior to *Morrison*, courts interpreted the Exchange Act of 1934 to apply to deceptive practices that occurred within the United States, this interpretation has been known as the “conduct test.”<sup>40</sup> In other words, even though section 10(b) of the Exchange Act and the Securities Act were silent with regard to its extraterritorial reach,<sup>41</sup> there were some situations in which the courts interpreted that Congress “would have wanted” the anti-fraud provisions to apply, if there were substantial misstatements or fraudulent manipulation regarding the traded security on U.S. soil.<sup>42</sup> Additionally, case law prior to *Morrison* couched the extraterritorial reach issue as a question of subject matter jurisdiction.<sup>43</sup> Federal courts developed three versions of the conduct test, ranging from strict to relaxed.<sup>44</sup> The seminal case that enunciated a strict version of the conduct test in the Second Circuit is *Bersch v. Drexel*

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Acts are to protect U.S. citizens).

39. See, e.g., *SEC v. Kasser*, 548 F.2d 109, 114 (2d Cir. 1976) (stating that U.S. securities laws indicate a broad Congressional intent and allow jurisdiction in cases where some of the activity—even foreign commerce—was designed to advance a fraudulent scheme in the United States).

40. Bertrand C. Sellier & Stacy Ceslowitz, *Ch. 25 Extraterritorial Application of U.S. Laws: Employment and Securities Laws*, PROSKAUER ROSE LLP, [http://www.proskauerguide.com/law\\_topics/25/IV](http://www.proskauerguide.com/law_topics/25/IV) (last visited Jan. 23, 2012) (discussing the lower courts jurisprudence prior to *Morrison* and explaining the conduct and effects tests); see also *Terra Sec. ASA Konkursbo v. Citigroup, Inc.*, 688 F. Supp. 2d 303, at 307-10 (S.D.N.Y. 2010) (discussing the conduct test).

41. See, e.g., *Zoelsch*, 824 F.2d at 31-32 (noting that there is a presumption that legislation passed by Congress does not have extraterritorial effect unless Congress otherwise provides).

42. Nicholas Even et al., *Securities Litigation and The Supreme Court: 2010 in Review and a Preview of 2011* 5 (UNIV. TEX. SCH. OF LAW, 2011), available at [https://haynesboone.com/files/Publication/f2484304-417d-4463-bbf6-c5981a1695ae/Presentation/PublicationAttachment/058c92e9-50d8-4eb1-9ff9-cae0efd807a7/Even\\_SR11\\_paper%20\(Jan%202011\).pdf](https://haynesboone.com/files/Publication/f2484304-417d-4463-bbf6-c5981a1695ae/Presentation/PublicationAttachment/058c92e9-50d8-4eb1-9ff9-cae0efd807a7/Even_SR11_paper%20(Jan%202011).pdf) (quoting *Morrison*, 130 S. Ct. at 2877-81).

43. Roger W. Kirby, *Access to United States Courts by Purchasers of Foreign Listed Securities in the Aftermath of Morrison v. National Australia Bank Ltd.*, 7 HASTINGS BUS. L.J. 223, 228 (2011) (“Prior to *Morrison*, decisions analyzing whether foreign plaintiffs may have access to United States courts often had framed the matter as one of jurisdiction.”); see also Irwin H. Warren & Matthew E.K. Howatt, *Transnational Securities Litigation In The U.S. Courts After Morrison v. National Australia Bank: An “F-Cubed” Regression Analysis* 12 (CAN. INST., 2010), available at <http://www.weil.com/files/Publication/362ff7fb-5049-42e0-a731-a5d457ae7b62/Presentation/PublicationAttachment/e83b53f9-93f0-4334-a164-ada9832feb9b/Canadian%20Institute%20Morrison%20Paper.pdf> (noting that the lower courts had previously analyzed the extraterritoriality issue as one of jurisdiction under the Federal Rules of Civil Procedure).

44. Sellier & Ceslowitz, *supra* note 40.

*Firestone, Inc. (Bersch)*.<sup>45</sup> In *Bersch*, the court held that section 10(b) of the Exchange Act applied to losses from securities traded to U.S. citizens domiciled in the United States, regardless of where the fraudulent activity occurred.<sup>46</sup> The court also held that section 10(b) applied to U.S. residents abroad, but only if the deceptive act occurred within the United States and helped bring about the injury.<sup>47</sup> The court also noted that U.S. securities laws could apply to foreigners so long as the culpable act within the United States directly caused the injury.<sup>48</sup> The Fifth and Seventh Circuits also required that the plaintiff show that the defendant's actions within the United States exceeded the preliminary stages and that the fraudulent conduct brought about the loss.<sup>49</sup> The lower courts in the Third and Ninth Circuits embraced a more relaxed approach in regard to the conduct test by only looking at whether actions within the United States contributed to a deceptive design.<sup>50</sup> Coupled with the conduct test, courts also articulated an "effects" test.<sup>51</sup> Under this test, a court determined whether the alleged fraudulent activities resulted in a significant and adverse effect within

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45. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975), *abrogated by* *Morrison*, 130 S. Ct. 2869 (2010) (enunciating the conducts and effects tests and stating that U.S. securities laws apply to individuals who engage in fraudulent activities that induce U.S. investors into purchasing the securities).

46. *Id.*

47. *Id.*

48. *Id.*

49. *See Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (S.D.N.Y. 1983), *abrogated by* *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010) ("[M]ere preparatory activities, and conduct far removed from the consummation of the fraud, will not suffice to establish jurisdiction. Only where conduct 'within the United States directly caused' the loss will a district court have jurisdiction over suits by foreigners who have lost money through sales abroad.") (quoting *Bersch*, 519 F.2d 974 at 993); *Robinson v. TCI/US West Commc'ns Inc.*, 117 F.3d 900, 905-06 (5th Cir. 1997), *abrogated by* *Morrison*, 130 S.Ct. 2869 (adopting the conducts test utilized by the Second Circuit requires a showing of more than preliminary activities to confer jurisdiction); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998), *abrogated by* *Morrison*, 130 S.Ct. 2869 ("[W]e believe [that] federal courts have jurisdiction over an alleged violation of the antifraud provisions of the securities laws when the conduct occurring in the United States directly causes the plaintiff's alleged loss in that the conduct forms a substantial part of the alleged fraud and is material to its success. This conduct must be more than merely preparatory in nature; however, we do not go so far as to require that the conduct occurring domestically must itself satisfy the elements of a securities violation.").

50. *See SEC v. Kasser*, 548 F.2d 109, 114 (2d Cir. 1976) ("[W]e decline to immunize, for strictly jurisdictional reasons, defendants who unleash from this country a pervasive scheme to defraud a foreign corporation."); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424-25 (9th Cir. 1983) (accepting the conduct test embraced by the Third Circuit).

51. *See* Client Newsflash, *supra* note 16.



the United States.<sup>52</sup> Some courts, including the Second Circuit, embraced a combined test that merged elements of the conduct test with elements of the effects test.<sup>53</sup>

It is important to note that even though lower courts employed different approaches to the “conduct and effects” tests, there are a few general rules that can be gleaned.<sup>54</sup> First, if a fraudulent activity was completely conducted outside of the United States, U.S. courts were unlikely to exert jurisdiction.<sup>55</sup> Second, U.S. courts were likely to exercise jurisdiction over foreign issuers when there was significant, fraudulent conduct in the United States that was not preliminary in nature.<sup>56</sup> Third, U.S. courts were likely to exert jurisdiction “over a non-U.S. issuer any time that a fraud committed by a non-U.S. issuer [had] an impact on U.S. investors or markets.”<sup>57</sup> Fourth, U.S. courts were likely to exert authority “over any scheme in which a U.S. citizen has been defrauded, even when the U.S. citizen purchased non-U.S. securities on a non-U.S. exchange.”<sup>58</sup>

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52. See *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968), *abrogated by Morrison*, 130 S. Ct. 2869 (holding that, in order to protect U.S. investors, Congress intended the Exchange Act of 1934 to have extraterritorial effect when there are fraudulent acts committed outside U.S. borders that have a detrimental effect within the United States); *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds*, 592 F.2d 409, 417 (8th Cir. 1979), *abrogated by Morrison*, 130 S. Ct. 2869 (holding that U.S. securities laws do confer extraterritorial jurisdiction in situations where some of the activity to create or aid in a fraudulent scheme happens abroad but has a detrimental effect within the United States); *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991), *abrogated by Morrison*, 130 S. Ct. 2869 (holding similarly to the previous two cases and finding the extraterritorial jurisdiction of U.S. securities law in some situations).

53. See, e.g., *Itoba Ltd. v. LEP Grp. PLC*, 54 F.3d 118, 122 (2d Cir. 1995), *abrogated by Morrison*, 130 S. Ct. 2869 (“There is no requirement that these two tests be applied separately and distinctly from each other. Indeed, an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court.”).

54. See *Sellier & Ceslowitz*, *supra* note 40.

55. See *Kaufman v. Campeau Corp.*, 744 F. Supp. 808, 810 (S.D. Ohio 1990) (“[T]his Court adopts the general proposition that the federal securities laws were not intended to protect foreigners who purchase stock on foreign exchanges.”); *Sellier & Ceslowitz*, *supra* note 40.

56. See *In re Royal Ahold N.V. Sec. & ERISA Lit.*, 351 F. Supp. 2d 334, 358 (D. Md. 2004) (“At a minimum, where, as here, there is significant U.S. involvement alleged in an otherwise foreign transaction, it is appropriate to engage in the judicially created “conduct” and “effects” analysis to determine whether subject matter jurisdiction exists over claims brought by overseas plaintiffs as well as claims against foreign defendants.”); *Sellier & Ceslowitz*, *supra* note 40.

57. See *Sellier & Ceslowitz*, *supra* note 40.

58. *Id.*

III. "F-CUBED" "F-SQUARED" AND *MORRISON*'S "TRANSACTIONAL" TEST

Generally, there are two categories of transactions in a securities deal that can lead to extraterritoriality enforcement issues: "F-cubed" and "F-squared" transactions.<sup>59</sup> In a foreign cubed (or so-called "F-cubed") transaction foreign plaintiffs purchase foreign securities on a foreign exchange.<sup>60</sup> Intuitively, it would appear that U.S. securities law would not apply to a wholly foreign transaction. However, F-cubed plaintiffs had successfully argued that a relevant U.S. nexus existed to confer jurisdiction where the fraudulent activity that led to the purchase took place within the United States.<sup>61</sup> An "F-squared" situation, on the other hand, is likely to occur when a domestic plaintiff purchases foreign stock on a foreign exchange.<sup>62</sup> The usual outcome regarding suit in the United States for an F-cubed plaintiff prior to *Morrison* was that where there was significant fraud related to activities in the United States, subject matter jurisdiction was applied to allow for transnational litigation.<sup>63</sup> The general result in the United States for F-squared plaintiffs prior to *Morrison* was that these U.S. investors were allowed to sue in U.S. courts.<sup>64</sup>

The 1970s brought a surge in global securities transactions, involving both foreign issuers and purchasers.<sup>65</sup> Heightened U.S. securities regulations and the class action mechanism of U.S. civil procedure made the United States a desirable forum for foreign

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59. See Luke Green, *Reflecting On Securities Class Actions One Year After Morrison v. NAB*, ISS GOVERNANCE BLOG (June 24, 2011, 2:39 PM), <http://blog.issgovernance.com/slw/2011/06/reflecting-on-securities-class-actions-one-year-after-morrison.html> (analyzing the *Morrison* decision and its impact as well as potential class action trends and discussing f-cubed and f-squared cases).

60. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2894 n.11 (2010).

61. See Green, *supra* note 59 ("In many circuits, where significant fraud related conduct occurred in the U.S., the test was also used to apply subject-matter jurisdiction over non-U.S. plaintiffs who traded non-U.S. stocks on non-U.S. exchanges (so called f-cubed cases).").

62. See *In re UBS Sec. Litig.*, No. 07 Civ. 11225 (RJS) at 3 n. 3 (S.D.N.Y. Sept. 13, 2011) (order granting motion to dismiss) ("'Foreign-squared' actions involve claims asserted by American investors who have purchased securities of (1) foreign issuers on (2) foreign exchanges." (quoting Defs.' Mem. at 2.)), available at <http://blog.internationalpractice.org/wp-content/uploads/2011/09/IN-RE-UBS-SECURITIES-LITIGATION-Judge-Sullivan-Order-9-13-11.pdf>.

63. Green, *supra* note 59.

64. *Id.*

65. Kirby, *supra* note 43, at 233.

claimants to redress fraud connected to those purchases.<sup>66</sup> Recently, the rise of complex securities transactions has led to controversy about whether U.S. securities laws should apply.<sup>67</sup> In *Morrison*, the U.S. Supreme Court rejected decades of jurisprudence developed by the lower courts and implemented a transactional test in order to determine if extraterritorial jurisdiction should be exerted over a particular claim.<sup>68</sup> The *Morrison* case was decided on June 24, 2010,<sup>69</sup> before Dodd-Frank's extraterritorial provisions went into effect on July 21, 2011<sup>70</sup> and before *RBS* was decided on January 11, 2011.<sup>71</sup>

*Morrison* was an F-cubed transaction, involving a group of private Australian plaintiffs who purchased shares of National Australia Bank Ltd. (National) on a foreign exchange in 2000 and 2001, just before the company wrote down approximately \$2.25 billion in assets.<sup>72</sup> In 1998, National had purchased HomeSide Lending (HomeSide), a Florida based mortgage servicing company, providing the basis for the argument there was a sufficient U.S. nexus to permit suit in the United States for violations of the Exchange Act.<sup>73</sup> The asset write down was based on devalued shares in HomeSide.<sup>74</sup> The plaintiffs alleged that "HomeSide [and officers] had manipulated HomeSide's financial models to make the rates of early repayment unrealistically low in order to cause the mortgage-servicing rights to appear more valuable than

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66. *See id.*

67. See Genevieve Beyea, *Transnational Securities Fraud and the Extraterritorial Application of U.S. Securities Laws: Challenges and Opportunities*, 1 GLOBAL BUS. L. REV. 139, 140 (2011) ("With globalization, securities markets have become progressively more interconnected, and securities fraud has increasingly crossed borders, creating problems for national regulators seeking to deter and punish fraud. The United States' well-developed private enforcement mechanism for securities fraud is very attractive to investors around the world who are harmed by transnational securities fraud, particularly those from countries where private enforcement mechanisms do not exist or fraud is under-regulated.").

68. See, e.g., Paul B. Maslo, Commentary, *Amputating the Long Arm of the Law: An Analysis of the U.S. Supreme Court's Decision in Morrison and Why Section 10(b) Still Reaches Issuers of ADRs*, 89 WASH. U. L. REV. 477, 479-84 (2012) (discussing the *Morrison* decision and the impact of its new transactional test).

69. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

70. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S. Code).

71. *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327 (S.D.N.Y. 2011).

72. *See Morrison*, 130 S. Ct. at 2875-76.

73. *Id.*

74. *Id.*

they really were.”<sup>75</sup> The plaintiffs argued that over a three-year period, “National’s annual reports and other public documents touted the success of HomeSide’s business.”<sup>76</sup> However, in 2001, National announced that it was writing down the value of HomeSide’s assets by over \$2 billion.<sup>77</sup> Essentially, the plaintiffs alleged that the fraudulent misstatements about HomeSide’s profitability originated in Florida and then were passed to Australia via public statements and financial documents.<sup>78</sup>

In *Morrison*, Justice Scalia unequivocally stated that the extraterritorial question was one that existed on the merits and not based on subject matter jurisdiction.<sup>79</sup> Essentially, the court concluded that F-cubed cases should be decided on the underlying, fundamental issue of whether a claim had been stated instead of primarily procedural grounds.<sup>80</sup> Therefore, the *Morrison* court emphasized that the fundamental issue going forward was not whether U.S. citizens were harmed via fraudulent actions by foreign issuers and should be afforded the opportunity to be heard in a U.S. court, but whether a claim had been stated that could be addressed by U.S. securities laws.<sup>81</sup> The *Morrison* Court found that there is a presumption that U.S. securities laws do not extend outside of domestic borders, noting that traditionally, unless Congress expressly declared a statute to have extraterritorial application, the statute was construed not to have effect outside of the United States.<sup>82</sup> The Court relied on a textual reading of the first part of 15 U.S.C. § 78b in deciding on a transactional

75. *Id.* at 2876.

76. *Id.* at 2875.

77. *See Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2875-76 (2010).

78. Isreal Dahan & Andrew Stemmer, *Foreign-cubed Case Rejected: The Second Circuit Court of Appeals Has Ruled that US Securities Laws Have No Extraterritorial Application to a Foreign Corporation*, INT’L FIN. L. REV., Feb. 2009, at 37, available at <http://www.cadwalader.com/assets/article/020109DahanStemmerIFLR.pdf>.

79. *See Morrison*, 130 S. Ct. at 2877 (“[T]o ask what conduct § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C.A. § 78j(b), reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, ‘refers to a tribunal’s’ ‘power to hear a case.’ It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief.”) (quoting *Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Cent. Region*, 130 S. Ct. 584, 175 L. Ed. 2d 428, 443 (2009) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006))).

80. Warren & Howatt, *supra* note 43, at 11.

81. *See Morrison*, 130 S. Ct. at 2876-77.

82. *See id.* at 2877-78.

interpretation of section 10 of the Exchange Act of 1934.<sup>83</sup>

Section 78b states, in part, that securities traded upon exchanges are ingrained with national public significance.<sup>84</sup> The Court further developed a transactional definition, based on section 78b, for when U.S. securities law should apply extraterritorially stating that:

Congress, in describing the purposes of the Securities and Exchange Act of 1934, has observed that the prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries . . . . The antecedent of “such transactions,” however, is found in the first sentence of the section, which declares that transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest. Nothing suggests that this national public interest pertains to transactions conducted upon foreign exchanges and markets. The fleeting reference to the dissemination and quotation abroad of the prices of securities traded in domestic exchanges and markets cannot overcome the presumption against extraterritoriality.<sup>85</sup>

Fundamentally, the transactional test precludes foreign purchasers of foreign securities on a foreign exchange from bringing a claim in a U.S. court.<sup>86</sup> In dismissing the case via the transactional test, the Court noted that the foreign plaintiffs did not purchase the pertinent securities on a U.S. stock exchange and that all purchases occurred outside of the United States.<sup>87</sup> However, it is questionable whether

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83. *See id.* at 2882; Securities Exchange Act of 1934 § 2, 15 U.S.C. § 78b (2006).

84. *See* 15 U.S.C. § 78b.

85. *Morrison*, 130 S. Ct. at 2882 (citations omitted) (quoting 15 U.S.C. § 78b(2)) (internal quotation marks omitted).

86. *See* Client Memorandum, *supra* note 21, at 2.

87. *See Morrison*, 130 S. Ct. at 2888 (“Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States. This case involves no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States.”).

Congress intended such a narrow definition of “transactions.” Reading 15 U.S.C. § 78b in its totality, Congress seemed to recognize the importance of full disclosure in preventing the manipulation of capital markets<sup>88</sup>—arguably fraudulent schemes resulting in the manipulation of U.S. markets can occur abroad and be spearheaded by foreign issuers. Remarkably, the *Morrison* Court summarily dismissed the conduct and effects tests, which are in essence balancing tests,<sup>89</sup> by arguing that the tests were unworkable<sup>90</sup>—despite the fact that those tests had in fact been used by the lower courts for decades. In Justice Stevens’ concurring opinion, joined by Justice Ginsburg, he recognized this paradox and noted that:

The text and history of § 10(b) are famously opaque on the question of when, exactly, transnational securities frauds fall within the statute’s compass. As those types of frauds became more common in the latter half of the 20th century, the federal courts were increasingly called upon to wrestle with that question. The Court of Appeals for the Second Circuit, located in the Nation’s financial center, led the effort . . . . [T]he Second Circuit eventually settled on a conduct-and-effects test . . . . Numerous cases flesh out the proper application of each prong. The Second Circuit’s test became the “north star” of § 10(b) jurisprudence not just regionally but nationally as well. With minor variations, other courts converged on the same basic approach . . . . In light of this history, the Court’s critique of the decision below for applying “judge-made rules” is quite misplaced. This entire area of law is replete with judge-made rules, which give concrete meaning to Congress’ general commands. “When we deal with private actions under Rule 10b-5,” then-Justice Rehnquist wrote many years ago, “we deal with a judicial oak which has grown from

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88. 15 U.S.C. § 78b (stating that transactions on securities exchanges have a national social importance making adequate regulation imperative).

89. See *Morrison*, 130 S. Ct. at 2880.

90. See *id.* at 2879 (stating that the conduct and effects tests had been hard for the lower courts to apply, particularly because there was no one factor in the analysis that had more weight than the others).

little more than a legislative acorn.”<sup>91</sup>

It is peculiar that the *Morrison* majority felt that the balancing test implemented by the lower courts to determine extraterritorial application of U.S. securities laws was inadequate, particularly since the Supreme Court has been known for positing their own balancing tests for a slew of issues from first amendment protections to the dormant commerce clause.<sup>92</sup> While there is a certain tension between the United States enforcing its securities laws against non-U.S. citizens and a foreign nation’s authority to enforce its own securities laws,<sup>93</sup> the ability of U.S. judges to interpret Congress’ intent is not a novel concept.<sup>94</sup> It would appear that the general premise behind the U.S. securities laws is to protect U.S. citizens and the U.S. capital markets from fraudulent practices.<sup>95</sup> Arguably, this premise remains regardless of where the fraudulent practices originate, and a balancing test to determine when U.S. securities laws apply does not exceed the authority of the judiciary. The *Morrison* Court argued, however, that their newly minted

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91. *Id.* at 2888-89 (Stevens, J., concurring) (citations omitted) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975)).

92. *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568-73 (1968) (finding that in analyzing whether a teacher’s false public statements about his school were punishable, the First Amendment requires weighing the school’s interests in restricting the speech of its employees versus the employee’s right to speak freely in a public forum); *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” (citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960))).

93. Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. INT’L L. & BUS. 207, 208 (2006) (“Extraterritoriality results in frequent conflicts between the United States and other nations. Furthermore, the application of extraterritoriality limits the ability of investors and issuers to select the securities regime of their own choosing. As a result, countries applying extraterritorial rules are insulated from competitive pressures to tailor rules toward the joint interests of investors and issuers. Rather, countries so insulated may craft regulatory regimes that satisfy the interests of either government bureaucrats or special interest groups.”).

94. *See, e.g.*, *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992) (“[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation . . .”).

95. *See generally* J. William Hicks, *Securities Regulation: Challenges in the Decades Ahead*, 68 IND. L.J. 791, 791-93 (1993) (discussing the traditional objectives of U.S. securities laws, such as limiting fraudulent activities and protecting investors).

transactional test would be less ambiguous and more evenly applied than the previous conduct and effects tests.<sup>96</sup> At this point, *Morrison* is a relatively new decision but there have already been arguments that the “bright line” transactional test is not so clear, as discussed further in Part V.

#### IV. THE APPLICATION OF *MORRISON*

So what has the *Morrison* transactional test ultimately meant for foreign private investors? The most obvious consequence of *Morrison* is that it ended the conduct and effects tests championed (in varying forms) by the lower courts.<sup>97</sup> In the post-*Morrison* district court cases, it has become extremely difficult—if not impossible—for F-cubed plaintiffs to obtain redress in the United States.<sup>98</sup> An excellent example of the new reality for F-cubed plaintiffs can be shown by a brief discussion of *In re Vivendi*,<sup>99</sup> which was decided by the United States District Court for the Southern District of New York on February 22, 2011, eight months after the *Morrison* decision.<sup>100</sup> *In re Vivendi* was an F-cubed, private class action lawsuit that alleged securities fraud and was initially commenced in 2002 by U.S. and foreign shareholders of the French company, Vivendi S.A. (Vivendi).<sup>101</sup> In 2007, the class was officially certified and included both U.S. and foreign shareholders.<sup>102</sup>

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96. See *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2886 (2010) (reasoning that the transactional test is clear and does not interfere with international securities laws).

97. See Richard W. Painter, *Dodd-Frank Extraterritorial Provision: Was it Effective, Needed, or Sufficient?*, 1 HARV. BUS. L. REV., 195, 198-99 (2011) (“The Court refused to recognize the ‘conduct and effects’ tests that had been used in the courts of appeals to allow some of these cases to proceed if conduct inside the United States was a substantial factor in causing fraud in a securities transaction outside the United States . . . . The *Morrison* Court did not directly address suits brought by the SEC or DOJ, but presumably the scope of Section 10(b) would be the same in those cases also, because—absent an express directive from Congress—the statute would not have a broader scope . . .”).

98. See, e.g., *In re Alstom S.A. Sec. Litig.*, 741 F. Supp. 2d 469, 472-73 (S.D.N.Y. 2010) (citation omitted) (“[T]he [*Morrison*] Court was concerned with the territorial location where the purchase or sale was executed and the securities exchange laws that governed the transaction. The ‘statute’s solicitude’ is directed at ‘transactions’ and the statute seeks to ‘regulate’ ‘transactions.’ That the transactions themselves must occur on a domestic exchange to trigger application of § 10(b) reflects the most natural and elementary reading of *Morrison*.”) (citation omitted).

99. *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512 (S.D.N.Y. 2011).

100. See *id.*

101. See *id.* at 520-21; *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158 (S.D.N.Y. 2003).

102. *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76 (No. 02 Civ. 5571



Ultimately, the court refused to dismiss the action and the case proceeded.<sup>103</sup> In January of 2010, the jury awarded damages against Vivendi in the amount of over \$9 billion dollars.<sup>104</sup> Vivendi appealed the verdict, contesting the damages calculation, hoping that the F-cubed case would get the same *Morrison* treatment.<sup>105</sup> Fortunately for Vivendi, and in an extreme reversal of fortunes for the plaintiffs, Judge Richard Holwell restricted the scope of the case to purchasers of Vivendi's American Depositary Shares,<sup>106</sup> which are issued by U.S. depository banks and signify at least a portion of a share of foreign stock.<sup>107</sup> This decision erased eighty percent of the previous damages award.<sup>108</sup> The effect of Judge Holwell's ruling significantly reduced the amount of damages spread across the diminished class.<sup>109</sup> This decision

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(RJH)(HBP)) (2007) (order granting class certification); *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76 (S.D.N.Y. 2007); see also Press Release, Abbey Spanier Rodd & Abrams LLP, Plaintiffs Win Jury Verdict in Securities Fraud Class Action Against Vivendi (Jan. 29, 2010), <http://www.abbeyspanier.com/press-releases/216-vivendi> ("The case was filed in 2002 and has been on trial in federal court in New York since October 5, 2009. The class includes persons from France, the United States, England, and the Netherlands who acquired Vivendi securities during the period October 30, 2000 to August 14, 2002. Plaintiffs alleged that defendants concealed the company's true liquidity risk during the class period, and investors suffered losses resulting from a liquidity crisis in mid-2002.").

103. Jordan Eth et al., *The Vivendi Verdict: Three Key Issues*, SEC. LITIG. REP. (Thomson Reuters, New York, NY), Mar. 2010, at 1, available at [http://www.mofo.com/files/Uploads/Images/10\\_3\\_VivendiVerdict\\_ThreeKeyIssues.pdf](http://www.mofo.com/files/Uploads/Images/10_3_VivendiVerdict_ThreeKeyIssues.pdf).

104. Press Release, Cleary Gottlieb, Trial Court Significantly Reduces High Profile Vivendi Jury Award in Light of Supreme Court's *Morrison* Decision (Feb. 24, 2011), [http://www.cgsh.com/trial\\_court\\_significantly\\_reduces\\_high\\_profile\\_vivendi\\_jury\\_award\\_in\\_light\\_of\\_supreme\\_courts\\_morrison\\_decision/](http://www.cgsh.com/trial_court_significantly_reduces_high_profile_vivendi_jury_award_in_light_of_supreme_courts_morrison_decision/) [hereinafter Press Release, Cleary Gottlieb].

105. See Melissa Colón-Bosolet, *The Elusive Nine: Securities Class-Action Trials Since 1995*, COMM. & BUS. LITIG., at 14 (2010), available at [law.capital.edu/WorkArea/DownloadAsset.aspx?id=8885](http://law.capital.edu/WorkArea/DownloadAsset.aspx?id=8885) ("Counsel for Vivendi recently filed a motion for judgment as a matter of law. Vivendi contends that the court lacked subject-matter jurisdiction over the claims of the 'foreign cubed' class members.").

106. See *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 533 (S.D.N.Y. 2011).

107. Client Alert, Priscilla S. Ng & David M. Furbush, Pillsbury Winthrop Shaw Pittman LLP, Supreme Court Scuttles F-Cubed Case, Limits § 10(b) to Domestic Transactions 2, n. 2 (June 29, 2010), <http://www.pillsburylaw.com/siteFiles/Publications/1BE8D07F3419BC7FBBFAF830E2FBD D36F.pdf>; see also *Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 365 (3d Cir. 2002) ("American Depositary Receipts ('ADRs') are financial instruments that allow investors in the United States to purchase and sell stock in foreign corporations in a simpler and more secure manner than trading in the underlying security in a foreign market.").

108. See Press Release, Cleary Gottlieb, *supra* note 104.

109. See Client Alert, Angelo Savino & Abby Sher, Cozen O'Connor P.C., Vivendi – The Multi-Billion Dollar Impact of *Morrison* on Foreign-Cubed Securities Litigation 1 (Mar. 24, 2011), [http://www.cozen.com/admin/files/publications/GIG\\_ProfLiab032411.pdf](http://www.cozen.com/admin/files/publications/GIG_ProfLiab032411.pdf).

was thought to be consistent with *Morrison's* transactional test because it precluded a section 10(b) recovery for investors who purchased foreign securities on a foreign exchange (wholly foreign transaction).<sup>110</sup>

However, *Morrison* should not necessarily be read as allowing foreign issuers of securities the complete freedom to deceptively solicit funds while avoiding enforcement actions.<sup>111</sup> As a commentator states, "*Morrison* expressly authorized purchasers, foreign or domestic, of securities listed on U.S. exchanges to act under that law against issuers, foreign or domestic."<sup>112</sup> *Morrison* also granted the SEC the ability to pursue enforcement actions against foreign issuers who engage in fraudulent activities that negatively affect the U.S. market.<sup>113</sup>

#### V. *IN RE ROYAL BANK OF SCOTLAND PLC SECURITIES*

RBS' financial woes were similar to that of National.<sup>114</sup> The private plaintiffs in *RBS*, also brought suit in the United States District Court for the Southern District of New York, arguing that "(1) *Morrison* does not bar claims relating to the purchase of securities listed on an U.S. stock exchange [listing theory]<sup>115</sup> . . . (3) *Morrison* does not bar claims based on purchases of [U.S. Depository Receipts (ADRs)];<sup>116</sup> and (4) *Morrison* does not apply to Securities Act [of 1933] claims."<sup>117</sup> Proponents of the "listing theory" assert that if a non-domestic issuer lists its shares on both a U.S. and foreign exchange, then section 10(b) covers all of the traded securities regardless of whether the purchases or

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110. Client Alert, Simpson Thacher & Bartlett LLP, Securities Law Alert 3-4 (Mar. 2011), <http://www.stblaw.com/content/Publications/pub1180.pdf>.

111. See Kirby, *supra* note 43, at 244.

112. *Id.*

113. *Id.* at 244-45.

114. See *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327, 331-32 (S.D.N.Y. 2011).

115. See Memorandum, Sullivan & Cromwell LLP, The Territorial Reach of U.S. Securities Laws After *Morrison v. National Australia Bank*: Recent Lower Court Decisions Applying *Morrison* Limit Overseas Reach of the U.S. Securities Laws (Sep. 29, 2011), [http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters\\_Content/2011/10\\_-\\_October/morrison-SCmemo.pdf](http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2011/10_-_October/morrison-SCmemo.pdf) [hereinafter Sullivan Memorandum] (explaining the interpretation of *Morrison* advanced by plaintiffs, which revolves around an ambiguity in the Court's holding that section 10(b) applies to fraud in connection with a securities transaction listed on a U.S. exchange).

116. See Maslo, *supra* note 68, at 477-78 (arguing that the transactional test in *Morrison* should not prevent ADR purchases from being able to bring suit under § 10 of the Exchange Act).

117. *In re Royal Bank of Scot. Grp.*, 765 F. Supp. 2d at 331.

sales were made on U.S. soil.<sup>118</sup> However, the *RBS* defendants urged the court to dismiss the Exchange Act claim under *Morrison* as well as the Securities Act Exchange Offer and Rights Issue claims, arguing that the Securities Act did not apply extraterritorially because the claims did not involve domestic securities dealings.<sup>119</sup> Ultimately, the court ruled against the plaintiffs pursuant to *Morrison*, stating that:

The idea that a foreign company is subject to U.S. Securities laws everywhere it conducts foreign transactions merely because it has “listed” some securities in the United States is simply contrary to the spirit of *Morrison*. Plaintiffs seize on specific language without at all considering, or properly presenting, the context . . . the Court makes clear its concern is on the true territorial location where the purchase or sale was executed and the particular securities exchange laws that governed the transaction: “[w]e know of no one who thought that the [Exchange] Act was intended to ‘regulat[e]’ foreign securities exchanges-or indeed who even believed that under established principles of international law Congress had the power to do so. The Act’s registration requirements apply only to securities listed on national securities exchanges.”<sup>120</sup>

There are, however, key differences between the positions of the plaintiffs in *RBS* as compared to *Morrison*. The most glaring distinction is that in *RBS*, the F-squared plaintiffs were primarily composed of U.S. citizens, while in *Morrison* all of the plaintiffs were foreign nationals.<sup>121</sup> In addition, the *Morrison* plaintiffs’ purchases took place on a foreign exchange,<sup>122</sup> while the *RBS* plaintiffs’ purchases arguably occurred within the United States because they relied on information from their

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118. See Sullivan Memorandum, *supra* note 115 (explaining the interpretation of *Morrison* advanced by plaintiffs, which revolves around an ambiguity in the Court’s holding that section 10(b) applies to fraud in connection with a securities transaction “listed” on a U.S. exchange).

119. *In re Royal Bank of Scot. Grp.*, 765 F. Supp. 2d at 331.

120. *Id.* at 336 (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884-85 (2010)).

121. See *id.* at 327; *Morrison*, 130 S. Ct. at 2886.

122. See *Morrison*, 130 S. Ct. at 2888.

U.S. asset managers in making their decision to buy the RBS shares and two of the plaintiff pension funds were based in the United States.<sup>123</sup> In addition, unlike *Morrison*, the *RBS* plaintiffs brought claims under both the Exchange Act of 1934 and Securities Act of 1933.<sup>124</sup>

The Southern District of New York has interpreted *Morrison* very broadly to preclude F-squared plaintiffs from recovery within the U.S. legal system.<sup>125</sup> In addition, in *RBS*, the court extended the *Morrison* holding that dealt with the Exchange Act of 1934 to the Securities Act of 1933.<sup>126</sup> The *RBS* court extended *Morrison's* core holding to the Securities Act of 1933 by arguing that the dicta in the *Morrison* decision stated that the Securities Act and Exchange Act are both focused on whether the securities were traded on a domestic exchange in determining extraterritorial applicability<sup>127</sup> - even though no Securities Act claims were asserted in *Morrison*.<sup>128</sup> In *RBS*, the Court held that the Rights claim<sup>129</sup> could be dismissed because the claim did not involve a transaction within the United States as defined by *Morrison*.<sup>130</sup> This broad interpretation of *Morrison* has made it

123. See *In re Royal Bank of Scot. Grp.*, 765 F. Supp. 2d at 336.

124. See *id.* at 334-35.

125. See, e.g., *id.* at 336-38.

126. *Id.* at 338 n.11 ("Plaintiffs argue that because *Morrison* involved solely an Exchange Act claim, it has no bearing on their Securities Act claims. However, the *Morrison* Court clearly expressed that the territorial reach of the Exchange Act and Securities Act involves the "same focus on domestic transactions.") (internal citations omitted) (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2885 (2010)).

127. *Id.*

128. *Morrison*, 130 S. Ct. at 2876 ("[The Australian petitioners] sued National, HomeSide, Cicutto, and the three HomeSide executives in the United States District Court for the Southern District of New York for alleged violations of § 10(b) and 20(a) of the Securities and Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. §§ 78j(b) and 78t(a), and SEC Rule 10b-5, 17 CFR § 240.10b-5 (2009), promulgated pursuant to § 10(b).").

129. *In re Royal Bank of Scot. Grp.*, 765 F. Supp. 2d at 332-33 ("On April 22, 2008 RBS announced a £12 billion (\$23.7 billion) rights issue (the 'Rights Issue') to increase the Company's capital base. The Rights Issue, the largest in European history, was needed in large part because of the £5.9 billion (\$11.6 billion) writedown.") (citations omitted) (internal citations omitted) (quoting Plaintiff's Consolidated Amended Complaint at ¶ 11-12). See also Graeme Wearden, *Rights Issues Explained*, THE GUARDIAN (Apr. 18, 2008, 07:01 EDT), <http://www.guardian.co.uk/business/2008/apr/18/royalbankofscotland> group.businessglossary (defining a rights issue as an issuance of additional shares of a company in order to raise capital).

130. See *In re Royal Bank of Scot. Grp.*, 765 F. Supp. 2d at 339 ("*Morrison* is dispositive as to the Rights Issue claims as no U.S. public offering is present and the Rights Issue did not involve a domestic securities transaction. Like the shares issued pursuant to the Exchange Offer, the shares issued pursuant to the Rights Issue were RBS ordinary shares, which the Court has already found to be deficient because of *Morrison*.").

extremely difficult for U.S. citizens to obtain a remedy in U.S. courts for securities fraud classified as having been “transacted abroad.”

## VI. DODD-FRANK AND THE EXTRATERRITORIAL ENFORCEMENT OF U.S. SECURITIES LAWS

Of growing concern to both private investors and foreign issuers is the reach and strength of Dodd-Frank’s extraterritorial provisions. For private investors who hope to avail themselves of the protections of tough U.S. anti-fraud securities regulations, powerful and far-reaching extraterritorial provisions are favored.<sup>131</sup> On the other hand, foreign issuers who may fear duplicative claims in multiple jurisdictions and foreign governments who may have valid sovereignty concerns would likely favor U.S. extraterritorial provisions with less bite and less reach.<sup>132</sup> Weaker U.S. extraterritorial provisions would surely add a distinct level of certainty for foreign issuers, and presumably reduce their disclosure costs.<sup>133</sup> It would appear, however, that Congress’ intent in including the extraterritorial provisions in Dodd-Frank was to at least partially abrogate *Morrison* by increasing the ability of governmental regulatory agencies to exert extraterritorial jurisdiction under the Exchange Act.<sup>134</sup> In the Congressional Record, House

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131. See Louise Corso, Note, *Section 10(b) and Transnational Securities Fraud: A Legislative Proposal to Establish a Standard for Extraterritorial Subject Matter Jurisdiction*, 23 GEO. WASH. J. INT’L. & ECON. 573, 603 (1989) (“[E]xpanding the jurisdictional reach also enhances the ability of the SEC ‘to police vigorously’ securities fraud, thus protecting domestic markets and investors and preventing the United States from becoming a safe harbor for those who wish to export fraud to foreign purchasers. Also, vigorous enforcement efforts in the United States may encourage other nations to work similarly to enforce their own securities fraud laws and to take actions against parties in their countries who are devising fraudulent schemes to be exported to the United States.”).

132. See Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 100-01 (2003) (“[T]he extraterritorial application of U.S. securities laws may give rise to a breach of international comity as well as cause frequent conflicts with the sovereignty of other countries. For instance, when seeking to regulate investment activity abroad, the United States cannot help but interfere with the regulatory systems of other countries and compel foreign banks and other institutions to reveal information that is otherwise protected under the laws of their countries. These conflicts may cause foreign countries to pass retaliatory legislation of their own.”).

133. See James D. Cox, *Rethinking U.S. Securities Laws in the Shadow of International Regulatory Competition*, 55 LAW & CONTEMP. PROBS. 157, 160 (1992) (discussing the benefits and drawbacks of additional securities disclosure requirements).

134. Thomas P. Cimino, Jr. et al., Vedder Price P.C., *Southern District of New York Judge Applies Morrison to Dismiss Federal Securities Claims Brought by U.S. Investors*

members affirmed that intent by noting:

[T]he purpose of the language of section 929P(b) of the bill is to make clear that in actions and proceedings brought by the SEC or the Justice Department, the specified provisions of the Securities Act, the Exchange Act and the Investment Advisers Act may have extraterritorial application, and that extraterritorial application is appropriate, irrespective of whether the securities are traded on a domestic exchange or the transactions occur in the United States, when the conduct within the United States is significant or when conduct outside the United States has a foreseeable substantial effect within the United States.<sup>135</sup>

This section is broken into two subsections. The first subsection will discuss Dodd-Frank's new extraterritorial provisions, sections 929P and 929Y. The second subsection will examine whether the new provisions would have altered the *In re Royal Bank of Scotland* decision and their potential affect toward subsequent cases, such as the recent SEC subpoena of Tiger Asia Management LLC.

#### A. Section 929P of Dodd-Frank

Section 929P of Dodd-Frank extends the power of U.S. governmental regulatory agencies,<sup>136</sup> while section 929Y provides for a study into the extension of authority to private investor extraterritorial rights of action.<sup>137</sup> Both sections became effective on July 21, 2011.<sup>138</sup> Section 929P amends and expands the scope of the Securities Act of 1933 and the Exchange Act of 1934 by providing that U.S. courts have jurisdiction over fraudulent conduct within the United States, as well as conduct that occurs outside of the United States if it has a "foreseeable

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*Against the Royal Bank of Scotland* (Apr. 8, 2011), <http://www.natlawreview.com/article/southern-district-new-york-judge-applies-morrison-to-dismiss-federal-securities-claims-brought>.

135. 156 Cong. Rec. H5,237 (daily ed. June 30, 2010).

136. 15 U.S.C. § 77v(c) (Supp. IV 2010) (amending 15 U.S.C. 77v (2006)).

137. Dodd-Frank Wall Street Reform and Consumer Protection Act, § 929Y, Pub. L. No. 111-203, 124 Stat. 1376, 1871 (2010).

138. See 15 U.S.C. § 77v(c); § 929Y.

substantial effect within the United States.”<sup>139</sup>

This section strengthens the power of the SEC and the DOJ to reach outside of the United States and call foreign issuers to stand before a U.S. court.<sup>140</sup> However, some argue that an error in the drafting of the section reduces its purported extension of power to U.S. government officials in enforcement actions.<sup>141</sup> This alleged drafting error is based on the distinction that *Morrison* made in characterizing the extraterritoriality issue as one that existed on the merits as opposed to jurisdiction.<sup>142</sup> In the new Dodd-Frank provisions, Congress describes the provision as extending the SEC and DOJ’s “jurisdiction.”<sup>143</sup> Therefore, it is unclear whether the new provisions effectively address *Morrison*’s core holding. One commentator suggests, on the other hand, that a reason for Congress’s drafting language is not an error, but a deliberate choice to address the extraterritorial reach of U.S. securities law as a matter of jurisdiction.<sup>144</sup>

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139. 15 U.S.C. § 77v(c).

140. See Eric C. Chaffee, *Is Financial Reform too Big to Fail? Emerging from the Financial Crisis with the Help of Increased Consumer Protection and Corporate Responsibility*, 60 AM. U.L. REV. 1431, 1446 (2011) (characterizing section 929P as a positive step in increasing the SEC’s enforcement power against foreign issuers, but noting that it is the only provision in Dodd-Frank that clearly enunciates the extraterritorial application of U.S. securities laws).

141. See Painter, *supra* note 97, at 202 (“In all of these versions of the bill, the legislative language addressed subject-matter jurisdiction. The language was not changed even though the SEC and the Solicitor General acknowledged the previous fall that this wasn’t a question of jurisdiction. Thus, the first explanation for what happened is that the SEC and Congress simply made a mistake. The Dodd-Frank provision had intended to address the merits of section 10(b) but did not.”); Meny Elgadeh, Note, *Morrison v. National Australia Bank: Life After Dodd-Frank*, 16 FORDHAM J. CORP. & FIN. L. 573, 593-94 (2011) (“A convincingly strong case could be made that Section 929[P] of Dodd-Frank has not effectively reversed the core holding of *Morrison*. The Dodd-Frank Act states in relevant part that ‘the district courts of the United States and the United States courts of any Territory shall have jurisdiction . . . alleging a violation . . . even if the securities transaction occurs outside the United States and involves only foreign investors . . .’ Significantly, the legislative text makes no mention of any change in the application of the securities laws. Rather it only speaks directly to a court’s ability to hear a case, a power fully recognized by the majority in *Morrison*.”).

142. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010).

143. 15 U.S.C. § 77v(c).

144. See Painter, *supra* note 97, at 203 (reasoning that Congress may have actually intended to address the extraterritorial reach of the securities laws as an issue of subject matter jurisdiction).

B. *Section 929Y of Dodd-Frank*

Section 929Y mandates that the SEC conduct a study to determine the degree that private individuals can bring court actions pursuant to the securities laws.<sup>145</sup> In conducting its authorized study of whether private rights of action against foreign issuers should be enhanced, the SEC is allowed to take the following factors into consideration: “(1) the scope of such a private right of action, including whether it should extend to all private actors . . . [;] (2) what implications such a private right of action would have on international comity . . . [;] (3) the economic costs and benefits . . . [; and] (4) whether a narrower extraterritorial standard should be adopted.”<sup>146</sup> The SEC is currently requesting comments on whether private rights of actions for investors should be extended, but any SEC recommendations to Congress as a result of this study will not reach Congress until well after February 2012.<sup>147</sup> Therefore, the effect of 929Y is even less clear than 929P. As of December 30, 2011, eighty-four comments have been submitted to the SEC,<sup>148</sup> ranging from pleas by state retirement fund managers to enhance private rights of actions for the extraterritorial provisions to opposition against such an extension by the U.K. government.<sup>149</sup>

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145. Dodd-Frank Wall Street Reform and Consumer Protection Act, § 929Y, Pub. L. No. 111-203, 124 Stat. 1376, 1871 (2010).

146. § 929Y(b).

147. See Study on Extraterritorial Private Rights of Action, SEC Release No. 34-63174, File No. 4-617 (Oct. 25, 2010), available at <http://www.sec.gov/rules/other/2010/34-63174.pdf>.

148. See *Comments on Study on Extraterritorial Private Rights of Action, Dodd-Frank Act Release No. 34-63174*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/comments/4-617/4-617.shtml> (last modified Jan. 17, 2012).

149. See Thomas P. DiNapoli, Comment, Study on Extraterritorial Private Rights of Action, Dodd-Frank Act Release No. 34-63174 (Dec. 20, 2011), available at <http://www.sec.gov/comments/4-617/4617-85.pdf> (“As Comptroller of the State of New York, I am the Trustee of the New York State Common Retirement Fund (‘the Fund’) . . . . As my original letter stated, the Fund is co-lead plaintiff in a securities class action seeking recovery for investment losses against BP, Plc stemming from its alleged misrepresentations to shareholders regarding both its lax safety procedures, which led to the disastrous explosion of the Deepwater Horizon, and its inability to clean up the oil spill in the Gulf of Mexico. Since February, I have continued to press and preserve all potentially viable claims against BP, including those claims of fraud based on the purchase and sale of the Fund’s holdings purchased on a foreign exchange. I realize, however, how difficult it will be to preserve these claims post *Morrison*.”); Jonathan Taylor, Comment, Study on Extraterritorial Private Rights of Action, Dodd-Frank Act Release No. 34-63174 (Feb. 11, 2011), available at <http://www.sec.gov/comments/4-617/4617-4.pdf> (“[T]he UK



C. *The Effect of Sections 929P and 929Y*

As discussed previously, section 929P purportedly re-extends the “conduct and effects” tests to the SEC and DOJ in bringing enforcement actions.<sup>150</sup> Therefore, even if section 929P had been effective at the time of *RBS*, it would not have had an effect on the court’s ruling regarding a suit brought by private plaintiffs. In contrast, section 929Y directly concerns the rights of private investors to bring suit.<sup>151</sup> However, because section 929Y involves a study by the SEC to determine if private rights of actions should be strengthened, its effect is still unknown. It is possible that even without section 929P the SEC could bring an action post-*Morrison*.<sup>152</sup> However, the intent of section 929P is to give the SEC or DOJ considerably more power in exerting extraterritorial jurisdiction over foreign issuers and U.S.-based firms who conduct business on foreign exchanges.<sup>153</sup> The SEC’s recent subpoena of Tiger Asia Management LLC (Tiger Asia) would appear to be an exercise of the SEC’s expanded power following Dodd-Frank.<sup>154</sup>

In late 2010, the SEC subpoenaed Tiger Asia in regards to insider trading allegations that were made by the Hong Kong Securities and Futures Commission (SFC).<sup>155</sup> Some observers argue that the SEC’s subpoena of Tiger Asia is a sign of increasing cooperation between the SEC and foreign regulators.<sup>156</sup> Tiger Asia is an asset

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Government does not consider that the scope of section 10(b) of the Exchange Act and Rule 10b-5 (the ‘antifraud provisions of the Exchange Act’) should be extended to private rights of action. Such an extension does not appear to be necessary to protect United States interests and, as explained in this letter, has the potential to conflict with the interests of the United Kingdom and other jurisdictions. . . .”).

150. See Chaffee, *supra* note 140, at 1446.

151. Dodd-Frank Wall Street Reform and Consumer Protection Act, § 929Y, Pub. L. No. 111-203, 124 Stat. 1376, 1871 (2010).

152. See Painter, *supra* note 97, at 214.

153. See *id.*

154. Legal Update, Mayer Brown LLP, SEC Expands Investigative Reach Under New Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act, Securities Litigation and Enforcement (Nov. 11, 2010), <http://www.mayerbrown.com/securities-litigation-enforcement/article.asp?id=9987&nid=13067>.

155. *Id.* (“[T]he SFC sought an injunction from the Hong Kong High Court to freeze Tiger Asia’s assets based on allegations that the firm had engaged in insider dealing and market manipulation involving China Construction Bank Corp . . . . In April 2010, the SFC sought to ban Tiger Asia from trading securities and derivatives listed on the Hong Kong exchange—the first time the SFC had ever sought such a prohibition.”).

156. See *id.*; Daisy Ku, *Hedge Fund Tiger Asia Gets SEC Subpoena*, REUTERS (Oct. 28 2010), <http://www.reuters.com/article/2010/10/28/tiger-asia-sec-idUSTOE69R081201>

management company that is headquartered in New York.<sup>157</sup> The SFC originally filed suit against Tiger Asia and three employees on August 5, 2009.<sup>158</sup> In 2009, Tiger Asia was approached by UBS AG<sup>159</sup> at the behest of Bank of America to invest shares in China Construction Bank Corp.<sup>160</sup> Tiger Asia subsequently engaged in a series of short sales and long transactions in the shares and made a notional profit in excess of \$30 million on January 6, 2009.<sup>161</sup> However, their good fortune did not last long as they incurred heavy losses on other transactions.<sup>162</sup> The SFC alleged that Tiger Asia's trades constituted insider trading in violation of Chinese securities laws, particularly section 291 of the Securities and Futures Ordinance, Cap. 571.<sup>163</sup> The SFC also argued that section 213 of the Securities and Futures Ordinance was created to give them expanded powers to protect the investing public by allowing the SFC to petition the court for judicial relief against violators.<sup>164</sup> However, the SFC's first attempt at enforcing China's securities laws against Tiger Asia ended in disappointment when the trial court ruled against their claim.<sup>165</sup>

The court reasoned that it did not have proper jurisdiction over the dispute and that section 213 solely authorized the Market Misconduct Tribunal or a criminal court to hear the case.<sup>166</sup> On February 7, 2012, the SFC will again try to change the decision that has prevented them from freezing the assets of Tiger Asia.<sup>167</sup> The outcome

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157. Sec. & Futures Comm'n v. Tiger Asia et al., HCMP 1502/2009 4 (C.F.I. June 21, 2011) (Legal Reference System) (H.K.), available at [http://legalref.judiciary.gov.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=76969&QS=%28tiger%7Casia%29&TP=JU](http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=76969&QS=%28tiger%7Casia%29&TP=JU).

158. *Id.* at 2.

159. UBS AG is a large Swiss bank. *UBS Dictionary of Banking*, UBS, [https://www.ubs.com/ch/en/search.html?querystring=UBS+AG&offset=0&\\_charset=utf-8&solution=dob&\\_charset=UTF-8](https://www.ubs.com/ch/en/search.html?querystring=UBS+AG&offset=0&_charset=utf-8&solution=dob&_charset=UTF-8) (last updated Nov. 28, 2011).

160. Tiger Asia et al., HCMP 1502/2009, at 4.

161. *Id.* at 4-5.

162. *Id.* at 5.

163. *Id.* at 5; see also Securities and Futures Ordinance, (2003) Cap. 571, 171, § 291 (H.K.) (LEXIS), available at 571 LOHK 291 (prohibiting insider trading).

164. Tiger Asia et al., HCMP 1502/2009 at 11.

165. See *id.* at 27.

166. *Id.*

167. Debra Mao, *Hong Kong's Tiger Court Fight Tests Regulator's Offshore Reach*, BLOOMBERG (Jan. 20, 2012), <http://www.bloomberg.com/news/2012-01-30/hong-kong-s-tiger-court-fight-tests-regulator-s-offshore-reach.html>.

will determine whether the SFC has the ability under Cap. 571 to sue for relief on its own instead of asking government agencies to bring the initial charges.<sup>168</sup> The problems that the SFC has encountered in bringing an enforcement action against Tiger Asia has highlighted the restrictions of its regulatory power and indicates to asset management companies that it may be in their best interests to operate offshore in more hospitable jurisdictions such as Hong Kong.<sup>169</sup> Unlike the SFC, the SEC has not had as difficult of a time bringing enforcement actions against alleged violators under the Securities Act or Exchange Act. If the SFC is unsuccessful in pursuing its claims, it will be up to the SEC to see if it is more successful in enforcing securities laws against Tiger Asia, given its expanded power under Dodd-Frank.

## VII. CONCLUSION

The lower court case law prior to *Morrison* utilized the “conduct and effects” tests to determine if a U.S. court could exert extraterritorial jurisdiction over a securities fraud case.<sup>170</sup> The *Morrison* decision precluded the ability for individual F-cubed plaintiffs to bring enforcement actions in the United States.<sup>171</sup> Courts, particularly the Southern District of New York, have interpreted the *Morrison* holding broadly and have precluded recovery for F-squared claimants<sup>172</sup> as well as extended the holding to the Securities Act.<sup>173</sup> This reading of *Morrison* extends outside of the bounds of the Court’s holding, and there should be a different interpretation.<sup>174</sup>

In addition, while it is clear that Congress’ intent in enacting section 929P was to increase the SEC and DOJ’s ability to bring extraterritorial enforcement actions,<sup>175</sup> it is unclear whether it will

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168. *See id.*

169. Ajay Shamdasani, *Tiger Asia Case Has Exposed Hong Kong Regulator’s Enforcement Reach, Say Lawyers*, REUTERS: FIN. REG. FORUM (Sept. 15, 2011), <http://blogs.reuters.com/financial-regulatory-forum/2011/09/15/tiger-asia-case-has-exposed-hong-kong-regulators-enforcement-reach-say-lawyers>.

170. *See* Client Newsflash, *supra* note 16.

171. *See Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

172. *See* Fredericks, *supra* note 20, at 93-96.

173. *See In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327, 331 (S.D.N.Y. 2011).

174. *See* Ventrizzo, *supra* note 29.

175. *See* Painter, *supra* note 97, at 214.

actually be effective<sup>176</sup> or whether section 929Y will afford private investors any additional power.<sup>177</sup> For now, it appears that despite Congressional concerns for U.S. citizens who are fraudulently induced to trade in foreign securities,<sup>178</sup> the ability for F-squared plaintiffs to obtain redress in U.S. courts is likely impossible if the fraudulently induced purchase occur on a foreign exchange.

VAREN R. MOORE

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176. *See id.* at 202.

177. *See supra* Part VI.

178. *See* Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2006).

